

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

TIMOTHY GRIMES,

Plaintiff,

v.

R. FOWLER, ET AL.,

Defendants.

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Case No. 2:01CV70526

OPINION AND ORDER

By: James P. Jones

United States District Judge

*Timothy Grimes, Pro Se Plaintiff; Susan Barr, Assistant Attorney General,
Richmond, Virginia, for Defendants.*

In this § 1983 action for damages by a state prisoner, the defendants have moved to dismiss part of the complaint because the prisoner did not exhaust his available administrative remedies as required by the Prison Litigation Reform Act of 1996 (“PLRA”). After conducting an evidentiary hearing, I find that proper exhaustion did not occur and thus grant the partial motion to dismiss.

I

The plaintiff’s pro se Complaint alleges that he was assaulted, repeatedly shocked with an electric stun gun, and placed in five-point restraints by Virginia

prison officers, all in violation of the Eighth Amendment. The plaintiff contends that these violations occurred on two separate occasions, once in December of 1999 at Red Onion State Prison (“ROSP”) and once in January of 2001 at Wallens Ridge State Prison (“WRSP”). The issue currently before the court concerns only the 1999 ROSP incident and whether the plaintiff exhausted his administrative remedies before bringing this lawsuit by filing a “Regular Grievance Form” as required by the Virginia Department of Corrections Division of Operations Procedure 866. (“DOP 866.”)¹

DOP 866 describes “Inmate Grievance Procedures” and states in relevant part: “Federal and state laws require inmates to exhaust available administrative processes prior to filing lawsuits. . . . To comply with these laws, exhaustion of the regular grievance procedure is mandatory prior to judicial action by the inmate.” To exhaust the “regular grievance procedure,” DOP 866-7.14 requires that a “Regular Grievance Form” be filed within thirty days from the date of the occurrence or incident. The plaintiff contends that, in response to the incident that occurred on December 21, 1999, he filed a “Regular Grievance Form” on January 5, 2000, but that it was either

¹ The defendants’ partial Motion to Dismiss for nonexhaustion was initially before another judge of this court who denied the motion on the ground that there was conflicting evidence. I subsequently granted the defendants’ request for an evidentiary hearing on this matter, in effect granting a reconsideration of the partial Motion to Dismiss.

lost, destroyed, or otherwise not documented.

An evidentiary hearing was held on the defendants' partial Motion to Dismiss and I had the opportunity to observe the testimony and judge the credibility of both the plaintiff and the defendants' witnesses. Having assessed all of the evidence, the following constitute the court's findings of fact in regard to this matter.

Evidence produced at the hearing shows that the plaintiff filed three "Emergency Grievance Forms," dated December 27, 1999, December 29, 1999, and January 6, 2000. However, DOP 866-4.0 clearly states that "the filing of an emergency grievance does not satisfy the exhaustion requirement." These emergency grievance forms further fail because they do not indicate the precise complaint asserted by the plaintiff in his § 1983 claim - namely his allegation of excessive force. The plaintiff's complaint on these emergency forms refers only to his need to see a doctor.

The evidence also shows that the plaintiff filed two "Informal Complaint Forms," one on January 6, 2000,² and another on January 8, 2000.³ DOP 866-7.13

² Like the emergency grievance forms, the January 6, 2000, "Informal Complaint Form" addresses only medical attention needed and does not make any allegation of excessive force.

³ This form was not introduced at the evidentiary hearing but was instead filed by the plaintiff following the hearing. Unlike the other forms, this one does specifically address the excessive force issues that are the subject of this lawsuit.

indicates that filing an “Informal Complaint Form” initiates the formal grievance process. However, once the informal complaint is responded to, the prisoner must then file a “Regular Grievance Form” if he disagrees with the outcome.

After reviewing the evidence, I do not find that the plaintiff ever filed a “Regular Grievance Form.” The RO SP Grievance Coordinator testified at the evidentiary hearing regarding how grievance forms are processed. The process is a detailed one, making it highly unlikely that a grievance could be overlooked. Other grievance forms that the plaintiff filed were in fact processed and produced at the hearing. Although the plaintiff certainly had adequate time and opportunity to file a “Regular Grievance Form,” I do not find that he did file one as required by DOP 866.

The plaintiff further contends that he spoke with the Warden of RO SP on December 22, 1999, and again in February of 2000 regarding the alleged assault and restraint and that this was a “good faith” effort to exhaust his administrative remedies. However, the Grievance Coordinator testified that each prisoner attends an orientation to learn how to file grievances and that there is no procedure in DOP 866 for filing verbal grievances. Further, the plaintiff had in fact filed a “Regular Grievance Form” on twenty-six prior occasions. As the plaintiff was fully aware of the proper procedure for exhausting his administrative remedies, I cannot find that his

conversations with the Warden satisfy the DOP 866 requirements.

II

The PLRA mandates exhaustion of administrative remedies: “No action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail, prison, or other correctional facility, until such administrative remedies as are available are exhausted.” 42 U.S.C.A. § 1997e(a) (West 1994 & Supp. 2002). Cases interpreting this provision have consistently required strict compliance with the applicable procedures. *See Poor v. Grayson*, No. 02-1436, 2002 WL 31085179, at *2 (6th Cir. Sept. 17, 2002) (unpublished); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000); *Houze v. Segarra, C.O.*, 217 F.Supp.2d 394, 397-98 (S.D.N.Y. 2002). The applicable administrative remedies available to the plaintiff are clearly outlined in DOP 866 and the plaintiff was familiar with such procedures. Because the plaintiff failed to file a “Regular Grievance Form” regarding the December 21, 1999, incident, he has failed to exhaust his administrative remedies.

III

For the reasons stated above, it is **ORDERED** that the portion of the plaintiff’s Complaint relating to the December 21, 1999, incident at ROSP is dismissed for

failure to exhaust administrative remedies.

ENTER: March 19, 2003

United States District Judge